

1 AMY K. VAN ZANT (STATE BAR NO. 197426)
avanzant@orrick.com
2 JASON K. YU (STATE BAR NO. 274215)
jasonyu@orrick.com
3 TAMMY SU (STATE BAR NO. 329652)
tsu@orrick.com
4 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
5 Menlo Park, CA 94025-1015
Telephone: +1 650 614 7400
6 Facsimile: +1 650 614 7401

7 MICHAEL C. CHOW (STATE BAR NO. 273912)
mchow@orrick.com
8 ORRICK, HERRINGTON & SUTCLIFFE LLP
2050 Main Street, Suite 1100
9 Irvine, CA 92614-8255
Telephone: +1 949 567 6700
10 Facsimile: +1 949 567 6710

11 OLIVIA CLEMENTS (*pro hac vice*)
ORRICK, HERRINGTON & SUTCLIFFE LLP
12 51 West 52nd St.
New York, NY 10019
13 Telephone: +1 212 506-5000
Facsimile: +1 212 506-5151

14 Attorneys for Plaintiff
15 TRADESHIFT, INC.

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18

19 TRADESHIFT, INC., a Delaware corporation,
20 Plaintiff,
21 v.
22 BUYERQUEST, INC., an Ohio corporation,
23 Defendant.
24
25
26
27
28

Case No. 3:20-cv-1294-RS

**PLAINTIFF TRADESHIFT, INC.'S
OPPOSITION TO DEFENDANT
BUYERQUEST, INC.'S MOTION FOR
LEAVE TO FILE FIRST AMENDED
ANSWER AND AFFIRMATIVE
DEFENSES**

Dept: 3 – 17TH FLOOR
Judge: The Hon. Richard Seeborg
Date: September 2, 2021
Time: 1:30 p.m.

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1 **I. INTRODUCTION**

2 More than one year after it filed its original Answer on June 3, 2020, BuyerQuest now
 3 seeks leave pursuant to Rule 15(a) to file its First Amended Answer (“Amended Answer”) to add
 4 affirmative defenses, withdraw certain affirmative defenses, and add factual allegations to the
 5 affirmative defenses that remain. Tradeshift opposes BuyerQuest’s motion for leave to add
 6 affirmative defenses and add factual allegations to existing affirmative defenses because
 7 BuyerQuest’s undue delay in seeking leave to amend its Answer fails to meet the good cause
 8 requirement of Rule 16 to modify the Court’s scheduling order, to the extent modifying the
 9 Court’s scheduling order is necessary. BuyerQuest’s motion claims that it was diligent in
 10 conducting fact discovery and could not have uncovered all the facts underlying its proposed
 11 amendments but identifies *zero* facts that it learned after the August 31, 2020 deadline to amend
 12 pleadings without leave of the Court to justify its failure to amend its Answer. Thus, BuyerQuest
 13 cannot satisfy the good cause requirement of Rule 16.

14 BuyerQuest’s undue delay and bad faith in seeking to amend its Answer and the prejudice
 15 resulting from allowance of the amendments are so severe, that BuyerQuest cannot meet the
 16 liberal amendment standard of Rule 15(a). Instead of responding to Tradeshift’s discovery
 17 requests in good faith to disclose the factual allegations Tradeshift now seeks to add to its existing
 18 affirmative defenses (which by its own concession have been known to BuyerQuest since at least
 19 August 2020, if not earlier), BuyerQuest chose to wait until after the close of fact discovery to
 20 amend its Answer to prevent Tradeshift from fully exploring BuyerQuest’s allegations during
 21 discovery. Such bad faith and gamesmanship will significantly prejudice Tradeshift and are
 22 precisely what Rule 15(a) is designed to avoid. Additionally, the affirmative defenses and
 23 supporting factual allegations BuyerQuest now seeks to add are futile because even taking the
 24 additional factual allegations as true, they would not survive a Rule 12(b)(6) motion to dismiss.

25 Accordingly, Tradeshift requests that the Court deny BuyerQuest’s Motion for Leave to
 26 File its First Amended Answer and Affirmative Defenses.

1 **II. STATEMENT OF RELEVANT FACTS**

2 **A. Factual Background**

3 Tradeshift filed its Complaint against BuyerQuest for breach of contract, breach of the
4 implied covenant of good faith and fair dealing, and tortious interference with contract on
5 February 20, 2020. ECF 1 (“Compl.”). The Complaint alleged that Tradeshift and third party
6 Smucker Services Company (“Smucker”) signed a contract (the “SSA”) in June 2019 for a
7 license to Tradeshift’s software solution and platform, a license to third party BuyerQuest’s
8 software solution, and for certain managed services to implement the joint Tradeshift/BuyerQuest
9 software solution (the “Smucker Project”). *Id.*, ¶ 9.

10 Around the same time, Tradeshift also entered into a set of agreements (the Tradeshift
11 Partner Program Agreement (ECF 113.03), the Cross Selling Attachment (ECF 113.04), and the
12 Reseller Order Form (ECF 113.05)) (collectively, the “BuyerQuest Agreements”) with defendant
13 BuyerQuest. The BuyerQuest Agreements provided for Tradeshift to act as BuyerQuest’s reseller
14 on the Smucker project, established a framework for future joint endeavors between Tradeshift
15 and BuyerQuest, and specifically established a payment and work schedule for BuyerQuest to act
16 as Tradeshift’s subcontractor in assisting Tradeshift in implementing the joint
17 Tradeshift/BuyerQuest solution for the Smucker Project. *Id.*, ¶¶ 12-15.

18 Ultimately, BuyerQuest interfered with the SSA between Tradeshift and Smucker and
19 breached its own obligations to Tradeshift under the BuyerQuest Agreements in the process. *Id.*,
20 ¶¶ 26-27, 34-44. Among other things, BuyerQuest’s CEO engaged in a campaign to mislead
21 Smucker to believe that Tradeshift could not perform technically as required under the SSA and
22 that Tradeshift was on the brink of financial ruin. *See e.g.*, ECF 107.05 (Tradeshift’s Objs. &
23 Resps. to BuyerQuest’s First Set of Interrogs. (Nos. 1-19)), pp. 17-26. At the direction of
24 BuyerQuest’s CEO, BuyerQuest’s Chief Product Officer also used Tradeshift’s confidential
25 specifications and designs to tailor BuyerQuest’s own product “roadmap” to replicate the features
26 of Tradeshift’s Pay solution in BuyerQuest’s own anemic procurement software solution so that it
27 could convince Smucker that BuyerQuest had the capability to take over responsibility for the
28

entire Smucker Project. ECF 107.04 (Tradeshift’s Suppl. Resp. to BuyerQuest’s First Set of Interrogs. (No. 19)). BuyerQuest’s interference campaign culminated in a January 7, 2020 in-person meeting at BuyerQuest headquarters between BuyerQuest’s executive team and key Smucker Project stakeholders at Smucker. Less than a week later, Smucker decided to terminate Tradeshift in favor of BuyerQuest, sending a January 16 termination notice to Tradeshift (Compl., ¶ 17). Because Smucker did not have time to comply with the termination provision of the SSA (which required notice of any material breach and a 30-day period for Tradeshift to cure) and still keep the Smucker Project on a desired “go-live” track, Smucker falsely claimed that Tradeshift had made misrepresentations to induce Smucker to sign the SSA and so purported to “void” the contract for fraud. Tradeshift subsequently sued BuyerQuest in the Northern District of California and Smucker in the Southern District of New York (as required by the respective agreements).

B. Procedural Background

1. Relevant Pleadings

On May 11, 2020, Tradeshift filed a complaint against Smucker for breach of the SSA in the Southern District of New York. *Tradeshift, Inc. v. Smucker Services Co.*, Case No. 1:20-cv-3661 (S.D.N.Y.), ECF 1. On June 26, 2020, Smucker filed an answer and counterclaims, alleging that Tradeshift made material misrepresentations regarding its capabilities. *Tradeshift, Inc. v. Smucker Services Co.*, Case No. 1:20-cv-3661 (S.D.N.Y.), ECF 16 (hereinafter “Smucker Answer”), pp. 9-38. BuyerQuest was well-aware of the allegations asserted by both parties in that action, both because the pleadings were public, and because at least as early as May 26, 2020, BuyerQuest and Smucker were negotiating a joint defense agreement. Ex. A¹ (BuyerQuest’s 2/13/2021 Privilege Log), Entry Nos. 15, 16.

On June 2, 2020, the Court issued its Initial Case Management Scheduling Order, setting August 31, 2020 as the deadline to amend pleadings without first seeking leave from the Court.

¹ Unless otherwise specified, all exhibit cites are to exhibits attached to the Declaration of Jason K. Yu in Support of Tradeshift’s Opposition to BuyerQuest’s Motion for Leave to File First Amended Answer and Affirmative Defenses (“Yu Decl.”).

ECF 36. BuyerQuest filed its original Answer and Affirmative Defenses (“Answer”) some three months ahead of that deadline on June 3, 2020. In its Answer, BuyerQuest asserted 21 affirmative defenses, though it did not allege *any* facts to support or explain them. *Id.* Among these boilerplate and conclusory defenses were the following defenses that BuyerQuest seeks the Court’s leave to amend now: Waiver, Estoppel, Acquiescence (Answer, p. 6), Unjust Enrichment (*id.*, p. 7), Third Party Acts or Omissions (*id.*, p. 8), Impossibility, Impracticability, Frustration of Purpose, Prevention of Performance (*id.*, p. 8), and Failure to Join Indispensable Parties (*id.*, p. 9).

1. Relevant Discovery

At the outset of discovery in this matter, on August 5, 2020, Tradeshift produced copies of: (1) the SSA between Tradeshift and Smucker (Yu Decl., ¶ 2); and (2) Smucker’s termination letter in which Smucker alleged that Tradeshift had made material misrepresentation about the Smucker Project (*id.*, ¶ 3).

Additionally, because BuyerQuest had pled no allegations of fact to support or explain any of its 21 affirmative defenses, Tradeshift propounded its Interrogatory No. 17, which asked BuyerQuest to describe the legal and factual bases for each of the affirmative defenses that it intended to rely on at trial. Ex. B (Tradeshift’s Second Set of Interrogs. to BuyerQuest (Nos. 7-18)). BuyerQuest initially refused to respond to Interrogatory No. 17, relying on boilerplate objections. Ex. C (BuyerQuest’s Resp. to Tradeshift’s Second Set of Interrogs. (Nos. 7-18)), pp. 10-11. After conferral, BuyerQuest agreed to supplement its response to Interrogatory No. 17 by March 26, 2021. Ex. D (email correspondence re BuyerQuest’s responses to Tradeshift’s Second Set of Interrogs.), pp. 1 (BuyerQuest offering to supplement its responses by March 26, 2021), 4 (Tradeshift agreeing to BuyerQuest’s offer). On March 26, 2021, BuyerQuest supplemented a number of its responses to other interrogatories in Tradeshift’s Second Set, but it did not, in fact, provide any further response to Interrogatory No. 17. Having agreed and had the opportunity to provide a substantive response if it had one, Tradeshift understood BuyerQuest’s lack of response to mean that it did not intend to rely on any the boilerplate defenses pled in its Answer. Even

1 though Tradeshift had attempted to question BuyerQuest’s FRCP 30(b)(6) witness, CEO Jack
 2 Mulloy, on April 20, 2021 on the factual bases of its affirmative defenses,² he could not identify
 3 specific facts in support of its defenses either. Ex. F (4/20/2021 Mulloy Dep. Tr.) at 276:25-
 4 278:9, 296:23-298:1. With Mr. Mulloy unable to provide facts, BuyerQuest’s counsel disrupted
 5 the line of questioning by declaring “discovery is ongoing in this case, and we will supplement
 6 our pleadings as necessary when the time comes. It’s not within the province of this witness to
 7 testify about....” *Id.* at 298:2-6. Yet, BuyerQuest did not supplement its response to
 8 Interrogatory No. 17 prior to the close of written fact discovery on April 2, 2021, prior to the
 9 close of non-expert depositions on April 30, 2021—or at any time since—and did not move for
 10 leave to amend its affirmative defenses as pled in its Answer until two months after that, even
 11 though it relied on facts that have been in its possession since the outset of discovery (and in
 12 some cases, even earlier).

13 Without identifying a single new fact that BuyerQuest has learned since the case was
 14 filed, since the deadline to amend pleadings without leave of court, since its responses to
 15 Tradeshift’s interrogatories, since the deposition of its corporate witness on this topic, or since the
 16 close of fact discovery, BuyerQuest now moves for leave to amend its Answer to: (1) add the
 17 affirmative defenses of Justification or Privilege, Set Off, and Limitation of Liability, (2) amend
 18 its affirmative defenses of Waiver, Estoppel, Acquiescence, Third Party Acts or Omissions,
 19 Duplicative Claims, and Failure to Join Indispensable Parties to add allegations of facts known to
 20 BuyerQuest at the time it filed its Answer or shortly thereafter, and (3) withdraw other affirmative
 21 defenses for which BuyerQuest concedes it does not have evidentiary support. Tradeshift opposes
 22 (1)-(2) and believes (3) is unnecessary since BuyerQuest can simply not pursue those defenses at
 23 trial.

24 **III. LEGAL STANDARD**

25 Federal Rule of Civil Procedure 15(a) provides that a party may amend any pleading by

26
 27 ² Mr. Mulloy was designated as BuyerQuest’s 30(b)(6) corporate designee for Topic 14: “The
 28 factual bases for the affirmative defenses in BuyerQuest’s answer in this action.” Ex. E (April 1,
 2021 Anthony Phillips Email).

1 moving for leave of court and instructs that leave to amend “shall be freely given.” *Foman v.*
 2 *Davis*, 371 U.S. 178, 182 (1962). In the Ninth Circuit this policy is “applied with extreme
 3 liberality.” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001) (citation
 4 omitted) (granting motion for leave to amend answer where defendant moved to amend
 5 immediately upon discovering the availability of the res judicata affirmative defense).

6 Courts consider five factors in determining whether leave to amend is warranted: (i) undue
 7 delay; (ii) prejudice to the opposing party; (iii) futility of the amendment; (iv) bad faith; and (v)
 8 whether the moving party has previously amended its pleadings. *Foman*, 371 U.S. at 182. In
 9 determining whether there was undue delay, courts “inquire ‘whether the moving party knew or
 10 should have known the facts and theories raised by the amendment in the original pleading.’”
 11 *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (citation
 12 omitted). Courts have found that delays of as short as eight months between obtaining a relevant
 13 fact and seeking leave to amend to be unreasonable. *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799
 14 (9th Cir. 1991).

15 While delay alone is normally insufficient to deny a motion to amend, a contemporaneous
 16 finding of prejudice, bad faith, or futility can also justify denying a motion for leave to amend.
 17 *Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D. 505, 507-508 (N.D. Cal. 2011), *aff’d*,
 18 475 F. App’x 334 (Fed. Cir. 2012) (citing *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999)).
 19 “[A] proposed amendment is futile only if no set of facts can be proved under the amendment to
 20 the pleadings that would constitute a valid and sufficient claim or defense.” *Sweaney v. Ada Cty.*,
 21 *Idaho*, 119 F.3d 1385, 1393 (9th Cir.1997) (citation omitted).

22 If the Court issued a scheduling order setting a deadline for amending pleadings, the party
 23 seeking leave to amend must first move to modify the scheduling order pursuant to Rule 16(b),
 24 upon a showing of good cause, *before* seeking leave to demonstrate that an amendment is proper
 25 under Rule 15(a). *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-09 (9th Cir. 1992).

26 **IV. ARGUMENT**

27 BuyerQuest’s Motion for Leave should be denied because it has failed to show good cause
 28

under Rule 16(b) to modify the Court’s scheduling order (to the extent necessary),³ and has not shown that its proposed amendments justify leave to amend under Rule 15(a).⁴

A. BuyerQuest’s Amendments Are Based on Facts That BuyerQuest Knew More Than 11 Months Ago (if Not Earlier).

The dates on which BuyerQuest discovered the factual bases for the amendments it seeks to add are important to the analyses under both Rule 15 (undue delay, bad faith, prejudice) and Rule 16 (good cause and diligence) considerations. Even under the liberal standards of Rule 15, “late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.” *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986).

Here, the facts that BuyerQuest seeks to add to its affirmative defenses were known to BuyerQuest *before the case was even filed* or, at best, in some cases, very early on in discovery. Notably, as Tradeshift’s subcontractor, BuyerQuest was intimately involved in the implementation of the Smucker Project. Indeed, because BuyerQuest was cajoling Smucker to jettison Tradeshift from the Project all along—and because Smucker and BuyerQuest have since entered into a joint defense agreement—BuyerQuest has undoubtedly had more knowledge about the relevant facts of its defenses than does Tradeshift. And, even for facts that were arguably not in BuyerQuest’s possession as of the date of the Answer, they were at the latest known to BuyerQuest (based on documents Tradeshift produced) at the outset of discovery in the case. As explained below, BuyerQuest’s motion does not provide any evidence or argument to suggest that it was not aware of these facts prior to any of the numerous relevant dates here, *i.e.*, the date BuyerQuest filed its original Answer, the deadline for BuyerQuest to file an Amended Answer without leave, or the date that BuyerQuest served its supplemental responses to Tradeshift’s

³ Tradeshift does not believe that it is necessary to move to amend the Court’s scheduling order because it did not contain a deadline for amending pleadings *with* leave of the Court. It only contained a deadline for amending pleadings *without* leave of the Court. However, to the extent BuyerQuest is correct that this is a requirement as it has argued in opposition to Tradeshift’s pending Motion for Leave (ECF 113, pp. 2-4), BuyerQuest certainly has not shown good cause here.

⁴ Tradeshift does not oppose BuyerQuest’s amendments to withdraw existing affirmative defenses.

1 interrogatories.

2 **1. Amendment to Add Justification and Privilege Affirmative Defenses**

3 BuyerQuest's original Answer did not include a Justification or Privilege Defense at all.
 4 BuyerQuest's amendment to add justification and privilege as affirmative defenses relies on the
 5 following boilerplate allegations: (1) BuyerQuest's actions with respect to all claims alleged in
 6 the Complaint were undertaken in good faith and for good cause, with the absence of any
 7 malicious intent or impropriety, and were lawful, proper, and justified; (2) any agreements and
 8 communications between representatives of BuyerQuest and Smucker were truthful, made in a
 9 good faith-effort to complete the project in the timeframe established in the project agreements,
 10 and were an exercise of BuyerQuest's legal rights and for a legitimate business purpose; (3)
 11 BuyerQuest's actions were taken, in whole or in part, to protect its economic interest in the
 12 Smucker Services Agreement, including its interest in payments owed to BuyerQuest that
 13 Tradeshift was required to pass-through to BuyerQuest once received from Smucker, but
 14 allegedly did not; (4) BuyerQuest faced the risk of a \$1.1 million penalty specified in the
 15 Smucker Services Agreement; and (5) at all times throughout the course of the relevant
 16 agreements, BuyerQuest communicated only truthful information to Smucker about Tradeshift,
 17 including answering Smucker's questions about whether Tradeshift had timely paid BuyerQuest
 18 (it had not) and forwarding publicly-available information about the financial condition of
 19 Tradeshift. Amended Answer, pp. 10-11.

20 BuyerQuest was clearly aware of these putative "facts"—which exclusively involve its
 21 own actions and motivations—before the case was filed. Notably, Tradeshift was not involved in
 22 BuyerQuest's clandestine agreements and communications with Smucker discussed in the
 23 proposed allegations above, and therefore, BuyerQuest could not have learned them from
 24 Tradeshift during discovery. But, as a party to those agreements and communications,
 25 BuyerQuest knew well before the lawsuit was filed all of the "facts" on which it now intends to
 26 rely to support the addition of the Justification or Privilege affirmative defense. In fact,
 27 BuyerQuest's counsel admitted that its failure to add justification and privilege as affirmative
 28

defenses was likely an “oversight” by prior counsel, proving that BuyerQuest knew all the facts necessary to plead them in their original Answer, but simply failed to do so (though he fails to explain why his own firm did not immediately move to add the defenses when it came on board nearly a year ago). Ex. G (6/25/2021 Email from Anthony Phillips).

2. Amendment to Third Party Acts and Omissions

BuyerQuest’s original Answer pled the defense of Third Party Acts or Omissions but included only one conclusory statement in support: “Plaintiff’s claims are barred and/or limited because Defendant is not liable for the acts, omissions, wrongs, or negligence of any other entity or individual,” and failed to identify any specific act or omission. Answer, p. 8. BuyerQuest’s amendment to this defense adds the following factual allegations: (1) Tradeshift’s misrepresentations to Smucker and BuyerQuest regarding the function and capabilities of its product, including those described in the January 16, 2020 termination letter; (2) Tradeshift’s failure to perform under the Smucker Services Agreement; and/or Smucker’s termination and/or rescission of the Smucker Services Agreements. Amended Answer, pp. 7-8.

These alleged “facts” were well known to BuyerQuest very early on in the case. BuyerQuest was aware of the existence of the January 16, 2020 termination letter and Smucker’s allegations against Tradeshift from Tradeshift’s Complaint (and, as discussed below, likely from Smucker itself). Compl., ¶¶ 17-19. Were there any doubt, Tradeshift also produced the January 16, 2020 termination letter that BuyerQuest references in its amendment on August 5, 2020. And, even before that, correspondence between BuyerQuest’s CEO, Jack Mulloy, and Smucker’s Project Manager, Jason Barr, show them scheduling joint calls with their lawyers as early as February 2020, *i.e.*, just after Tradeshift filed suit and months before BuyerQuest filed its Answer. Exs. H-I (February 2020 text messages between Mr. Barr and Mr. Mulloy discussing how Smucker’s outside counsel will advise on whether Smucker can provide the termination letter to BuyerQuest); Ex. J (April 2020 text messages between Mr. Barr and Mr. Mulloy discussing a call between BuyerQuest and Smucker counsel). And we know that Smucker and BuyerQuest ultimately signed a joint defense agreement by June 22, 2020. Ex. A (BuyerQuest’s

2/13/2021 Privilege Log), Entry No. 16. Therefore, it is likely BuyerQuest learned of the allegations and contentions from Smucker or from Smucker's June 26, 2020 publicly filed Answer in SDNY, which contained the same allegations of misrepresentations and failure to perform that BuyerQuest now wants to add more than a year later. Smucker Answer, ¶¶ 22-58.

3. Amendment to Waiver, Estoppel, Acquiescence

Buyer Quest's original Answer pled the defense of Waiver, Estoppel, Acquiescence but included only one conclusory statement in support: "Plaintiff's claims are barred and/or limited by the equitable doctrines of waiver, estoppel, and acquiescence." Answer, p. 6. BuyerQuest's proposed amendment to this defense adds the following factual allegations: (1) Tradeshift was aware of the actions and communications by BuyerQuest that now form the basis of their claim for breach of contract prior to the termination of the relationship in January 2020 and did not raise any concerns or objections to BuyerQuest at any time during the course of the BuyerQuest-Tradeshift Agreement; (2) BuyerQuest therefore was unaware that Tradeshift objected to any of these actions or communications, and detrimentally relied on Plaintiff's tacit approval and permissive response; (3) Plaintiff provided BuyerQuest with "notice of termination of the SOW per our agreement" on January 23, 2020; and (4) BuyerQuest justifiably relied on this representation to consider the BuyerQuest-Tradeshift Agreement terminated. Amended Answer, p. 8.

Though it defies logic to suggest that BuyerQuest and Smucker involved Tradeshift in communications about, *e.g.*, concocting a rationale to terminate Tradeshift so Smucker could give the entire project to BuyerQuest, had it actually involved Tradeshift in such communications, BuyerQuest would have been in possession of the allegations it now wants to plead as soon as they occurred during the course of the project and thus prior to the filing of this case. BuyerQuest has no explanation for its delay in pleading these allegations.

4. Amendment to Impossibility, Impracticability, Frustration of Purpose, Prevention of Performance

Buyer Quest's original Answer pled the defense of Impossibility, Impracticability, Frustration of Purpose, Prevention of Performance but included only one conclusory statement in

1 support: “Plaintiff’s claims are barred and/or limited to the extent that performance was
 2 impossible, impracticable, or due to frustration of purpose or prevention of performance.”
 3 Answer, p. 8. BuyerQuest’s proposed amendment to this defense adds the following factual
 4 allegations: (1) The BuyerQuest-Tradeshift Agreement was premised on the parties working
 5 together to complete the Smucker project; (2) The BuyerQuest-Tradeshift Agreement and the
 6 Smucker Services Agreement established a master contractor-subcontractor relationship between
 7 Tradeshift and BuyerQuest, respectively; (3) Tradeshift’s failure to perform under the Smucker
 8 Services Agreement, including their failure to deliver promised software functionality; failure to
 9 meet project deadlines; and failure to implement software that could pass Smucker’s testing
 10 requirements, in-turn prevented BuyerQuest’s performance under the BuyerQuest-Tradeshift
 11 Agreement and/or rendered its performance impossible or impracticable and/or frustrated the
 12 purpose of the BuyerQuest-Tradeshift Agreement, which was to complete the Smucker project;
 13 (4) when Smucker terminated that project on January 16, 2020, any obligations of performance
 14 BuyerQuest owed to Tradeshift became effectively impossible; and (5) as described in Smucker’s
 15 termination letter to Tradeshift, Plaintiff’s pre-contracting misrepresentations to Smucker
 16 rendered the Smucker Services Agreement void *ab initio* and the performance of the BuyerQuest-
 17 Tradeshift Agreement was rendered impossible as a matter of law. Amended Answer, pp. 9-10.

18 BuyerQuest was aware of the first two facts when it entered into the Buyer-Quest-
 19 Tradeshift Agreements, nearly two years before the filing of this lawsuit. And, because
 20 BuyerQuest was involved during the implementation and testing of the software functionality
 21 promised under the SSA, BuyerQuest would have had knowledge of any alleged Tradeshift
 22 “failures,” including any missed project deadlines or failures to pass Smucker’s testing
 23 requirements as they occurred, and that is before Smucker ever terminated its Tradeshift contract
 24 and well prior to the filing of this lawsuit. Moreover, BuyerQuest admits that it discussed
 25 Tradeshift’s alleged “failures” at least during its secret meetings with Smucker in late 2019 and
 26 early 2020, *i.e.*, before the case was even filed. *See e.g.*, Ex. K (3/26/2021 BuyerQuest’s Second
 27 Suppl. Resps. to Tradeshift’s First Set of Interrogs. (Nos. 4-5), pp. 8-9) (explaining that
 28

1 BuyerQuest met with Smucker on December 19-20, 2019 and January 7, 2021 to discuss
 2 “Tradeshift’s inability to satisfy the Smucker Agreement,” “gaps in functionality . . . which
 3 Tradeshift had failed to address,” and “deficiencies in Tradeshift’s product.”) And, as discussed
 4 above, BuyerQuest was aware of the termination of the project and Smucker’s allegations of pre-
 5 contracting misrepresentations by Tradeshift, no later than August 5, 2020 (but likely much
 6 earlier due to the joint defense agreement between BuyerQuest and Smucker).

7 **5. Amendment to Failure to Join Indispensable Parties**

8 Buyer Quest’s original Answer pled the defense of Failure to Join Indispensable Parties
 9 but included only one conclusory statement in support: “Plaintiff’s claims are barred and/or
 10 limited based on Plaintiff’s failure to join one or more indispensable parties who are subject to
 11 service of process, whose joinder will not deprive the court of subject-matter jurisdiction, and
 12 who’s absence will deprive the Court of the ability to accord complete relief among the existing
 13 parties.” Answer, p. 9. BuyerQuest’s amendment to this defense adds the following factual
 14 allegation: Plaintiff’s claims arise entirely out of Smucker’s termination of the Smucker Services
 15 Agreement, who alleged that it was induced by Tradeshift’s fraud. Amended Answer, p. 12.
 16 Presumably, then, BuyerQuest believes that Smucker is an indispensable party.

17 BuyerQuest was aware of Tradeshift’s claims as of at least February 26, 2020, when
 18 BuyerQuest was served with the Complaint, and, as discussed above, was aware of Smucker’s
 19 allegations of misrepresentation and fraud no later than August 5, 2020 (but likely much earlier
 20 due to the joint defense agreement between BuyerQuest and Smucker).

21 **6. Amendment to Unjust Enrichment and Addition of Set Off**
 22 **Affirmative Defense**

23 Buyer Quest’s original Answer pled the defense of Unjust Enrichment but included only
 24 one conclusory statement in support: “Plaintiff’s claims are barred and/or limited because any
 25 recovery to Plaintiff would unjustly enrich Plaintiff.” Answer, p. 7. BuyerQuest’s proposed
 26 amendment to this defense adds the affirmative defense of “Set Off” add the following factual
 27 allegations: (1) Plaintiff’s Complaint seeks damages for not less than \$4,323,070; (2) while
 28 Plaintiff does not explain how this figure was calculated, it is greater than the full value of either

1 the BuyerQuest-Tradeshift Agreement or the Smucker Services Agreement; and (3) this figure
 2 also does not contemplate the monies already received under the BuyerQuest-Tradeshift
 3 Agreement or Smucker Services Agreement, or the damages sought by Tradeshift in the ongoing,
 4 related action brought against Smucker in the Southern District of New York. Amended Answer,
 5 p. 9.

6 BuyerQuest was aware of the damages Tradeshift sought when BuyerQuest was served
 7 with the Complaint on February 26, 2020. ECF 9. Additionally, BuyerQuest knew both the full
 8 value of the BuyerQuest-Tradeshift Agreement and the amount of any monies Tradeshift had
 9 received under the Smucker Services Agreement before the litigation was filed and it likewise
 10 knew the full value of the SSA at least as of August 5, 2020, when Tradeshift produced the SSA
 11 to BuyerQuest (and likely earlier, due to its joint defense agreement with Smucker).

12 **7. Amendment to Add Limitation of Liability Affirmative Defense**

13 BuyerQuest's proposed amendment to add a Limitation of Liability affirmative defense
 14 relies on the following proposed factual allegation: any potential liability is expressly limited
 15 under the BuyerQuest-Tradeshift Agreement and incorporated in related agreements. Amended
 16 Answer, p. 12. But BuyerQuest had knowledge of this alleged express limitation in the
 17 BuyerQuest-Tradeshift Agreement when it was executed in June 2019. Complaint, ¶¶ 14-15.

18 **B. Rule 16: BuyerQuest Has Not Shown Good Cause to Modify the Scheduling**
 19 **Order.**

20 The Court need not consider issues beyond BuyerQuest's total failure to show that it acted
 21 in a timely manner to seek the present amendments. However, just as BuyerQuest failed at
 22 explaining even at a cursory level why its amendments were timely, it likewise fails to show good
 23 cause. "Rule 16(b)'s good cause standard primarily considers the diligence of the party seeking
 24 the amendment. The district court may modify the pretrial schedule if it cannot reasonably be
 25 met despite the diligence of the party seeking the extension." *Johnson*, 975 F.2d at 609 (internal
 26 quotations omitted and emphasis added).

27 BuyerQuest has not been diligent, and it provides no evidence to the contrary. *See* Mot. at
 28 5-6. Instead, BuyerQuest argues only that its current counsel were not substituted into the case

1 until September 14, 2020 and, “[t]herefore BuyerQuest could not meet the deadline set in the
 2 Initial Case Management Order [August 31], despite its diligence” Mot. at 6. But new
 3 counsel is not a sufficient reason to excuse delay. *Sterling Sav. Bank v. Poulsen*, No. 12-01454
 4 EDL, 2013 WL 12173596, at *3 (N.D. Cal. Apr. 25, 2013) (finding that “new counsel’s different
 5 strategy” was insufficient to excuse delay); *Quan v. San Francisco Police Dep’t*, No. C 10-01835
 6 MEJ, 2011 WL 2470477, at *5 (N.D. Cal. June 21, 2011) (finding that change in counsel did not
 7 excuse delay of over one year in seeking to amend complaint even where “current counsel may
 8 disagree with the pleading his predecessor drafted”). BuyerQuest offers no reason why its prior
 9 counsel could not have reasonably met the August 31 deadline to amend its Answer. BuyerQuest
 10 implies that its prior counsel was somehow careless in failing to assert certain factual allegations
 11 or affirmative defenses prior to the August 31 deadline, but never actually makes that argument
 12 and, in any event, that excuse “is not compatible with a finding of diligence and offers no reason
 13 for a grant of relief.” *Johnson*, 975 F.2d at 609.

14 More confoundingly, BuyerQuest provides no substantive explanation as to why its
 15 current counsel did not diligently move for leave to amend BuyerQuest’s answer in the ten
 16 months since it became counsel of record. Instead, BuyerQuest simply concludes—without
 17 support—that BuyerQuest acted diligently during this time. *See, e.g.*, Mot. at 6-7 (“BuyerQuest
 18 did not have the factual or evidentiary basis to determine which affirmative defenses may be
 19 applicable against the claims asserted.”; “BuyerQuest could not have uncovered the full set of
 20 facts underlying its proposed amendments to its affirmative defenses...until it had the opportunity
 21 to conduct discovery.”; “BuyerQuest has diligently re-evaluated and amended its affirmative
 22 defenses.”). Simply repeating that BuyerQuest acted with diligence, however, does not make it
 23 so. Indeed, BuyerQuest fails to identify so much as *a single* fact that it allegedly discovered
 24 during discovery that necessitated its need to amend its answer now. In fact, as discussed above,
 25 the additional factual allegations BuyerQuest seeks to include in its Amended Answer were
 26 known to BuyerQuest prior to the August 31 deadline to amend without leave of court (and were
 27 likely known to BuyerQuest prior to filing its Answer on June 3).

Accordingly, to the extent it is required, BuyerQuest has failed to demonstrate the diligence required for a showing of “good cause” under Rule 16.

C. Rule 15: BuyerQuest Has Failed to Meet the Standard for Obtaining Leave to Amend.

The Court should also decline to grant BuyerQuest leave to amend under Rule 15. Though BuyerQuest nowhere acknowledges this fact in its Motion, Tradeshift propounded an interrogatory (No. 17) on BuyerQuest on January 18, 2021, asking it to identify each affirmative defense it intended to rely on and any facts in support thereof. Ex. B, p. 8. BuyerQuest did not bother to substantively respond to that interrogatory. Ex. C, pp. 10-11. BuyerQuest had every opportunity to disclose those facts, *e.g.*, (1) in its June 3, 2020 Answer, (2) in an Amended Answer that could have been filed without leave until August 31, 2020, (3) in BuyerQuest’s February 17, 2021 Responses to Tradeshift’s Interrogatory No. 17, (4) in its March 26, 2021 Supplemental Responses, or (5) in any other discovery responses prior to the April 3, 2021 close of written discovery and April 30, 2021 close of fact depositions. BuyerQuest did not do so and, instead, delayed in order to keep Tradeshift in the dark until depositions and discovery were complete.⁵ Moreover, as explained herein, allowing BuyerQuest to amend at this late stage would prejudice Tradeshift because there is discovery it would have sought had BuyerQuest timely disclosed its allegations, but now fact discovery is closed.

1. The Court Should Deny BuyerQuest’s Request for Leave to Add a “Justification or Privilege” Defense.

BuyerQuest’s proposed Amended Answer seeks to add an affirmative defense of “Justification or Privilege.” Amended Answer, pp. 10-11. The circumstances do not warrant leave to add this defense at this point in the case.

a. BuyerQuest’s Undue Delay in Seeking to Add the Defenses of Justification and Privilege Prejudices Tradeshift

The factors of undue delay, bad faith, and prejudice weigh heavily against granting leave

⁵ In contrast, when Tradeshift discovered the facts supporting its request for leave to amend, it immediately notified BuyerQuest in conferral communications and supplemental interrogatory responses so that BuyerQuest could ask about the issues during discovery (which it did). ECF 107 (Tradeshift’s Contingent Mot. for Leave to File FAC), pp. 4-5, 8.

1 to amend here. As discussed above (Section IV.A.1.), all the factual allegations BuyerQuest
 2 makes to support its defenses of justification and privilege were known to BuyerQuest prior to
 3 Tradeshift filing this lawsuit. That BuyerQuest knew of these facts prior to filing its original
 4 Answer over a year ago but sat on its hands until after discovery was closed to assert a new
 5 affirmative defense should not be viewed favorably by this Court. *Aciri*, 781 F.2d at 1398.
 6 BuyerQuest provides no explanation in its motion for why it failed to allege these affirmative
 7 defenses in its original Answer and identifies *zero facts* in its motion for leave that it learned
 8 during discovery to justify or explain its over one-year delay in seeking to amend its Answer to
 9 add these affirmative defenses.

10 During conferral with Tradeshift, BuyerQuest's current counsel tried to blame its failure
 11 to plead these defenses on an oversight by prior counsel. Ex. G. But BuyerQuest does not make
 12 that argument here and, in any event, that would not explain why BuyerQuest failed to otherwise
 13 identify the defenses and the facts supporting them during discovery or why BuyerQuest's current
 14 counsel waited 10 months after it took over representation of BuyerQuest and two months after
 15 the close of fact discovery to move for leave to amend. BuyerQuest failed to act with diligence in
 16 seeking to disclose this defense, and it provides no evidence or argument to the contrary. It just
 17 sat on its hands from the outset through discovery to assert this defense. BuyerQuest's decision
 18 to wait until *after* the close of fact discovery to seek to add these defenses that were known to it
 19 when it filed its original Answer is per se bad faith gamesmanship.

20 BuyerQuest's delay of its disclosure of its Justification or Privilege defense until after the
 21 close of discovery significantly prejudices Tradeshift. Had Tradeshift known about the defense, it
 22 would have taken additional discovery and potentially retained an expert on relevant issues. For
 23 example, the defense of justification requires "a balancing of the importance, social and private,
 24 of the objective advanced by the interference against the importance of the interest interfered
 25 with, considering all circumstances including the nature of the actor's conduct and the
 26 relationship between the parties." *Herron v. State Farm Mut. Ins. Co.*, 56 Cal. 2d 202, 206
 27 (1961); *see also Freed v. Manchester Serv., Inc.*, 165 Cal. App. 2d 186, 190 (1958). Had
 28

1 BuyerQuest disclosed its justification defense in a timely manner, Tradeshift would have
 2 investigated the societal interest BuyerQuest was supposedly seeking to protect with its actions
 3 and could have presented additional expert testimony on why protection of that societal interest
 4 did not outweigh Tradeshift's interest in the contract.

5 As another example, the defense of privilege requires a showing that the actions taken to
 6 protect a legally protected interest were "appropriate means." *Richardson v. La Rancherita*, 98
 7 Cal. App. 3d 73, 81 (1979). If BuyerQuest had disclosed its privilege defense earlier, Tradeshift
 8 could have taken additional discovery to determine whether BuyerQuest believed its actions were
 9 typical in the software as a service ("SaaS") industry, whether there were standards in the SaaS
 10 industry that would govern BuyerQuest's actions, and, if so, Tradeshift likely would have sought
 11 expert testimony as to whether BuyerQuest's actions lived up to those SaaS industry standards.
 12 Tradeshift also would have asked BuyerQuest's witness more focused questions about
 13 BuyerQuest's "societal and private" interests advanced by the interference and why those
 14 witnesses believe that the means of interference justified those interests.⁶ Simply put, Tradeshift
 15 has been prejudiced by BuyerQuest's failure to disclose this defense in its Answer, in an earlier
 16 Amended Answer, or in any response to discovery requests. And, given the nature of the defense
 17 and the facts supporting it, that prejudice appears intentional. Accordingly, the factors of undue
 18 delay, bad faith, and prejudice weigh against granting BuyerQuest leave here.

19 **b. BuyerQuest's Addition of the Defense of Justification or**
 20 **Privilege Is Futile Because It Is Legally Insufficient**

21 BuyerQuest's amendment to add the affirmative defenses of justification or privilege
 22 should also be denied as futile. As BuyerQuest admits in its opposition to Tradeshift's motion for
 23 leave to amend, the proper test to be applied when determining the legal sufficiency of a proposed
 24 amendment is the same applied to a pleading challenged under rule 12(b)(6). *See* ECF 113 at 9.

25 A justification defense requires "a balancing of the importance, social and private, of the
 26

27 ⁶ Furthermore, if discovery must be reopened and expert discovery extended causes the
 28 November 1 trial date to be continued, Tradeshift will be prejudiced with the further delay in
 having its claims resolved.

1 objective advanced by the interference against the importance of the interest interfered with,
 2 considering all circumstances including the nature of the actor's conduct and the relationship
 3 between the parties." *Herron*, 56 Cal. 2d at 206; *see also Freed*, 165 Cal. App. 2d at 190
 4 (identifying the relevant factors in determining whether the interference is justified: (1) the nature
 5 of the actor's conduct; (2) the nature of the expectancy with which his conduct interferes; (3) the
 6 relations between the parties; (4) the interest sought to be advanced by the actor; and (5) the
 7 social interests in protecting the expectancy on the one hand and the actor's freedom of action on
 8 the other hand). The interest of mere competition is not enough. *Imperial Ice Co. v. Rossier*, 18
 9 Cal. 2d 33, 36 (1941) ("[A] person is not justified in inducing a breach of contract simply because
 10 he is in competition with one of the parties to the contract and seeks to further his own economic
 11 advantage at the expense of the other."). Here, even accepting BuyerQuest's anemic proposed
 12 factual allegations as true, BuyerQuest fails to identify any societal interest to be protected that
 13 has a greater social value than simply enforcing the contracts at issue in this case, and thus,
 14 BuyerQuest's amendment as to the defense of justification would be futile.

15 BuyerQuest's amendment to add the affirmative defense of privilege is also futile. The
 16 affirmative defense of privilege requires: (1) a legally protected interest; (2) in good faith
 17 threatens to protect it; and (3) the threat is to protect it by appropriate means. *Richardson*, 98 Cal.
 18 App. 3d at 81. Even accepting BuyerQuest's factual allegations as true, they would fail to show
 19 that: (1) BuyerQuest's actions were made in good faith to protect its legally protected interest;
 20 and (2) BuyerQuest was protecting its interest by appropriate means. The only alleged "interests"
 21 that BuyerQuest identified in its amendment are: (1) its economic interests in payments owed to
 22 BuyerQuest that Tradeshift was required to pass-through to BuyerQuest once received from
 23 Smucker; and (2) the risk of a \$1.1 million penalty that BuyerQuest negotiated that it would face
 24 in the event the Smucker Project did not meet its deadline. Amended Answer, p. 11. But
 25 BuyerQuest was not acting to "protect" its interest in getting paid by Tradeshift. To the contrary,
 26 it was acting to throw Tradeshift under the bus so BuyerQuest could take Tradeshift's share of the
 27 contract. Indeed, BuyerQuest's interference caused a breach of the agreement and termination of
 28

the project which would have ensured that (1) no further payments would be made to Tradeshift (and passed through to BuyerQuest) and (2) the project would not meet the deadline and the penalty could be assessed. Furthermore, as a subcontractor to Tradeshift on the Smucker Project—which BuyerQuest admits it was (Answer, ¶ 8)—BuyerQuest’s unauthorized communications with Smucker about Tradeshift made without Tradeshift’s knowledge are not “appropriate means.” Therefore, BuyerQuest’s defense fails as a matter of law and would not be appropriate even if the other factors did not weigh against BuyerQuest. Accordingly, BuyerQuest’s motion for leave to amend should be denied as to the new affirmative defense of privilege.

2. **The Court Should Deny BuyerQuest’s Request for Leave to Add a “Set Off” Affirmative Defense.**

BuyerQuest’s proposed Amended Answer seeks to add an affirmative defense of “Set Off.” Amended Answer, p. 9. The circumstances do not warrant leave to add this defense at this late point in the case. As noted above, BuyerQuest was perfectly capable of asserting this defense in its original Answer, a timely filed Amended Answer, or in response to Tradeshift’s specific interrogatories, but it did not do so. Accordingly, the factors of undue delay and bad faith weigh against BuyerQuest.

More importantly, BuyerQuest’s amendment would be futile. “[T]he right of setoff (also called ‘offset’) allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A.” *Los Angeles Cty. Emps. Ret. Ass’n v. Towers, Perrin, Forster & Crosby, Inc.*, No. CV 01 -1351DDP, 2002 WL 32919576, at *7 (C.D. Cal. June 20, 2002) (citing *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995)). To determine whether the right of setoff exists, the Ninth Circuit established a three-prong test to determine mutuality of debts: (1) the debts must be in the same right; (2) the debts must be between the same individuals; and (3) those individuals must stand in the same capacity. *Id.* at *8-9.

Here, BuyerQuest’s affirmative defense of set off is futile because, even accepting its

1 factual allegations related to its defense of set off are true, there is no mutuality of debts between
 2 Tradeshift and BuyerQuest. BuyerQuest does not have any claims or counterclaims against
 3 Tradeshift at all. Thus, under “no set of facts can be proved under [BuyerQuest’s amendment] to
 4 the pleadings that would constitute a valid and sufficient...defense” of set off because
 5 BuyerQuest cannot establish mutual debts between the same individuals. Accordingly,
 6 BuyerQuest’s motion for leave to amend should be denied as to the new affirmative defense of set
 7 off.

8 **3. The Court Should Deny BuyerQuest’s Request for Leave to Add a**
 9 **“Limitation of Liability” Affirmative Defense.**

10 BuyerQuest’s proposed Amended Answer seeks to add an affirmative defense of
 11 “Limitation of Liability.” Amended Answer, p. 12. The circumstances do not warrant leave to
 12 add this defense at this late point in the case. As noted above, the basis BuyerQuest cites for this
 13 defense comes straight out of the BuyerQuest Agreements and thus BuyerQuest was perfectly
 14 capable of asserting this defense in its original Answer, a timely-filed Amended Answer, or in
 15 response to Tradeshift’s discovery requests, but it did not do so. Accordingly, the factors of
 16 undue delay and bad faith weigh against BuyerQuest.

17 More importantly, BuyerQuest’s amendment would be futile. BuyerQuest offers no
 18 substantive facts and, instead, simply concludes that “Plaintiff’s claims are barred, in whole or in
 19 part, because any potential liability is expressly limited under the BuyerQuest-Tradeshift
 20 Agreement, and incorporated in related agreements.” Mot, Ex. A at 12. Such conclusory
 21 statements are not enough to satisfy the pleading standard. *Ingram v. City of San Francisco*, No.
 22 C12-3038 JSC, 2012 WL 3257805, at *3 (N.D. Cal. Aug. 8, 2020) (dismissing an amended
 23 complaint where the cause of action was “supported by mere conclusory statements.”) (quoting
 24 *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)). Accordingly, BuyerQuest’s motion for leave to
 25 amend should be denied as to the new affirmative defense of Limitation of Liability.

26 **4. The Court Should Deny BuyerQuest’s Request for Leave to**
 27 **Supplement Its Affirmative Defenses with Any Facts.**

28 Even as to the defenses that were mentioned (although not supported) in BuyerQuest’s

1 original Complaint, the Court should deny BuyerQuest's request for leave to amend.

2 The undue delay, bad faith, and prejudice factors again weigh strongly against granting
 3 leave here. As discussed above, the majority of factual allegations that BuyerQuest seeks to add
 4 in its First Amended Complaint were known to BuyerQuest long prior to its filing of its Answer
 5 on June 3, 2020, and all of the factual allegations were known by no later than August 5, 2020,
 6 well before the August 31, 2020 deadline to amend pleadings without leave of Court. Most
 7 importantly, they were all known long, long before BuyerQuest sought leave to amend its Answer
 8 this month, nearly a year after the deadline for amending as of right had passed. BuyerQuest
 9 offers no explanation for its delay, other than conclusory statements alleging that it "worked
 10 diligently to conduct fact discovery in a timely manner, analyze evidence and testimony..., and
 11 reevaluate the relevance of its affirmative defenses..." (a contention hotly contested by
 12 Tradeshift, who was forced to file multiple letter briefs to seek discovery out of BuyerQuest).
 13 Mot. at 11. While delay alone is insufficient to justify denying a motion to amend, BuyerQuest's
 14 motion for leave to amend its previously pled affirmative defenses should be denied because it is
 15 extremely untimely while made in bad faith and would prejudice Tradeshift. *Trans Video Elecs.*,
 16 278 F.R.D. at 507-508.

17 BuyerQuest's motion is a bad faith attempt to avoid having its affirmative defenses of
 18 Waiver, Estoppel, Acquiescence, Unjust Enrichment, Third Party Acts or Omissions,
 19 Impossibility, Impracticability, Frustration of Purpose, Prevention of Performance, and Failure to
 20 Join Indispensable Parties dismissed before trial due to its utter failure to substantiate those
 21 defenses in a timely manner during discovery. BuyerQuest's failure to respond to Interrogatory
 22 No. 17—not once, but twice—was a tacit admission that BuyerQuest did not have adequate
 23 factual or legal bases to support those defenses and, therefore, did not intend to pursue them.
 24 That BuyerQuest did not disclose the factual allegations that it seeks to add now in response to
 25 Interrogatory No. 17 is itself grounds to preclude any argument or evidence to support those
 26 defenses at trial. Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a
 27 witness as required by Rule 26(a) or (e), the party is not allowed to use that information or
 28

1 witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was
 2 substantially justified or is harmless.”); Fed. R. Civ. P. 26(e) (“[a] party who has made a
 3 disclosure under Rule 26(a) – or who has responded to an interrogatory, request for production, or
 4 request for admission – must supplement or correct its disclosure or response: (A) in a timely
 5 manner if the party learns that in some material respect the disclosure or response is incomplete
 6 or incorrect, and if the additional or corrective information has not otherwise been made known to
 7 the other parties during the discovery process or in writing”); *Bernstein v. Virgin Am., Inc.*,
 8 No. 15-cv-02277-JST, 2018 W 6199679, at *2-5 (N.D. Cal. Nov. 28, 2018) (striking defendant’s
 9 waiver defense where plaintiff failed to disclose documents during discovery). Now, BuyerQuest
 10 wants it both ways; it made a conscious choice to evade discovery on the facts supporting its
 11 defenses when discovery was open (*see* Ex. F at 298:2-6 (counsel stating that BuyerQuest would
 12 supplement its discovery responses on any facts supporting its affirmative defenses in lieu of
 13 testimony from its CEO)), but now that Tradeshift cannot test those facts (since fact discovery is
 14 closed), it seeks to amend its Answer to include factual allegations that it has known all along.
 15 BuyerQuest’s motion amounts to a bad faith, last ditch attempt to avoid having its existing
 16 affirmative defenses stricken due to its own conscious and abject failure to timely respond to
 17 directly relevant discovery. *See Trans Video Elecs.*, 278 F.R.D. at 510 (finding bad faith and
 18 denying a motion for leave to amend complaint where motion was found to be a “last-ditch
 19 attempt to avoid the case being dismissed in its entirety”). Such gamesmanship is not to be
 20 rewarded with leave to amend.

21 Additionally, allowing BuyerQuest to amend its existing affirmative defenses to add
 22 factual allegations not timely disclosed during discovery is prejudicial to Tradeshift. Granting
 23 BuyerQuest’s motion would force Tradeshift to rebut affirmative defenses that it expected
 24 BuyerQuest would be prevented from presenting at trial and that Tradeshift could not fully
 25 explore during discovery (which is now closed) due to BuyerQuest’s failure to identify such facts
 26 in its original Answer, in response to Interrogatory No. 17, and at its corporate deposition on this
 27 topic. For example, BuyerQuest’s Amended Answer is the first time BuyerQuest has alleged
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that: (1) Tradeshift was aware of the actions and communications by BuyerQuest that now form the basis of their claim for breach of contract prior to the termination of the relationship in January 2020 and did not raise any concerns or objections to BuyerQuest at any time during the course of the BuyerQuest-Tradeshift Agreement or that (2) BuyerQuest was unaware that Tradeshift objected to any of these actions or communications, and detrimentally relied on Plaintiff's tacit approval and permissive response. Without knowledge that BuyerQuest was going to allege that Tradeshift was somehow aware of all of BuyerQuest's furtive communications with Smucker (an allegation that is spurious on its face) and that BuyerQuest supposedly relied on Tradeshift's "tacit approval and permissive response" (to communications it did not know were happening), Tradeshift did not know it should have explored which communications with which BuyerQuest was imputing Tradeshift with knowledge, what facts led BuyerQuest to believe that Tradeshift had given tacit approval or a permissive response, and why that resulted in BuyerQuest's detrimental reliance.

Thus, because BuyerQuest acted with undue delay and in bad faith, and the amendments would result in severe prejudice to Tradeshift (including increased costs for additional discovery, lack of timely discovery in an orderly manner, and likely losing the current trial date), BuyerQuest's motion for leave to amend its existing affirmative defenses to add additional factual allegations should be denied.

V. CONCLUSION

Because BuyerQuest's amendments would severely prejudice Tradeshift, BuyerQuest acted with undue delay and bad faith in seeking to amend its existing affirmative defenses, and BuyerQuest's attempt to add affirmative defenses is futile, the Court should deny BuyerQuest's Motion for Leave to File First Amended Answer and Affirmative Defenses.

Dated: July 22, 2021

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Amy K. Van Zant

AMY K. VAN ZANT

Attorneys for Plaintiff
TRADESHIFT, INC.